

The European Constitutional Group:

The constitutional approach to limiting the power of government at the European level

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The European Constitutional Group (ECG) is an association of currently fifteen liberal economists, legal scholars and historians from ten European countries.¹ It is independent and self-financing. Each meeting is organized by one member in his or her home town. It meets at irregular intervals as the need arises. It was founded in 1992 and published three versions of a proposed Constitutional Treaty of the European Union – the first in 1993 and the last in 2006.² The idea of writing a constitutional treaty was taken up by the “European Convention for the Future of Europe” summoned in 2003 under the direction of Valéry Giscard d’Estaing. However, the group criticized and opposed the draft of the Convention in a declaration published by Frankfurter Allgemeine Zeitung (21.03.05), the Financial Times London (23.03.05), NRC Handelsblad (24.03.05) and Le Figaro (24.05.05). The group argued that the draft of the Convention would expand rather than limit the power of government at the EU level. As the Convention’s draft was rejected in referenda in France and elsewhere it has been formally abandoned but large parts have survived in the Treaty (actually two treaties) of Lisbon. Subsequently, the ECG has sent three open letters on Brexit and the reform of the eurozone to the President of the European Council and the President of the European Commission.³

The European Constitutional Group follows the economic approach to politics. It focuses on the incentives and self-interest of political actors, and it adopts a constitutional approach to reforming the European Union. While in the legal literature constitutions are regarded as

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² 1. „A Proposal for a European Constitution“, December 1993 (broschüre, European Policy Forum, London). A condensed version of this proposal was published in 1997 (broschüre). 2. „A Basic Constitutional Treaty“, June 2003 (online). This was summarized in an article in a scholarly journal in 2004: Peter Bernholz et al., „An Alternative Constitutional Treaty for the European Union“, Public Choice 91 (2), 451-68. 3. „A Proposal for a Revised Constitutional Treaty“, April 2006 (online). All three texts have been sent to the European Council. They are available from the author (e-mail: vaubel@uni-mannheim.de) and from his website (www.vwl.uni-mannheim.de/vaubel) under the heading „unpublished manuscripts“.

³ They have been published on the website www.wirtschaftlichefreiheit.de in December 2015 and March 2018 and are also available from the author.

centralizing devices, the constitutional treaty envisaged by the ECG is intended to constrain the power of government – in this case at the centre. The group argues that the EU lacks constitutional limits. The ECG applies liberal constitutional principles such as subsidiarity, proportionality and the delegation and separation of powers to criticize the current institutional set-up of the European Union.

Subsidiarity assigns the burden of proof to those who want to centralize. They have to give reasons why, in their view, the objectives of the treaty cannot be sufficiently achieved by the member states but can better be achieved at the Union level (Art. 5 Sect. 3 TEU). However, the crucial question is not who has to give reasons but who decides about their validity. The European Constitutional Group criticizes the fact that the validity of the alleged reasons is evaluated by EU actors who possess a self-interest in centralizing political power at the EU level. As a result, the principles of subsidiarity and proportionality as enshrined in the Treaty have always been ineffective.

Montesquieu's principle of the separation of powers is clearly incompatible with the legislative and quasi-judicial role of the European Commission. In spite of being the executive, the Commission has the right and, indeed, a monopoly of legislative initiative, and it acts as a quasi-judicial first instance in trade and competition policy. The members of the European Parliament are probably the only parliamentarians in the world who do not have the right to submit a legislative proposal.

As the ECG emphasizes, the centralization of policy gives the state more power over the citizens. By opposing centralization, the ECG aims to protect the freedom of the individual.

The proposals of the European Constitutional Group

1. The European Commission

- A) The right of legislative initiative should be transferred from the Commission to the members of the European Parliament and the Council as a whole.

Since the Treaty of Maastricht (1993), Council and Parliament have been entitled to "request" the Commission to submit legislative proposals (Arts. 225 and 241 TFEU). But the Commission has insisted almost immediately that it does not feel bound by such requests (SEC (95) 731). According to the Commission, the small number of requests proves that there is no need for a change. However, as long as the Commission may ignore requests, there is little point in making them. Even if an EU policy has failed, the Commission will not propose decentralizing legislation because that would reduce its power. Thus, European legislation is a one-way street in the direction of "ever closer union" (preamble of TEU). This is inconsistent with subsidiarity. By contrast, the legislative role of the Council is acceptable because its members, even though they play an executive role in their home countries, do not fulfill an executive function at the European level.

- B) The legislative majority requirement in the Council should not depend on the opinion of the Commission.

According to Art. 294 Sect. 9 TFEU, the Council is required to “act unanimously on the amendments on which the Commission has delivered a negative opinion”. This, too, gives the Commission legislative power.

- C) The Commission’s quasi-judicial powers in competition and trade policy and its oversight role in relation to fiscal policy should be assigned to independent bodies. These reforms would diffuse political power and improve the separation of powers.
- D) The role of the Commission should be to assist the Council.
As a pure executive and bureaucracy, the Commission ought to be subordinated to ministers who owe their position entirely to parliaments. The Commissioners, it is true, have to be confirmed by the European Parliament but they are selected by the governments of the member states.

2. The European Parliament

- A) The ECG proposes to add a second chamber composed of representatives of the national parliaments determined by lot. It may veto legislation which it considers incompatible with the principles of subsidiarity and proportionality.
Like the Commission the members of the European Parliament have a vested interest in centralization at the Union level because centralization increases their power. Several simultaneous surveys of MEPs and the public at large prove that MEPs prefer more European centralization than the citizens do. To eliminate the centralist bias, it is necessary that legislative decisions about the allocation of competencies between the Union and the member states are taken by other institutions than legislative decisions within the competency of the Union. To avoid self-selection, the parliamentarians in the second chamber are to be determined by lot within their national parliamentary factions. Otherwise the most europhile national parliamentarians would tend to run for the second EU chamber. Determination by lot played an important role in the republican constitutions of ancient Athens and Venice.
- B) The second chamber and the Council may also agree to simplify or annul previous EU legislation. Such acts would have to be proposed by a simple majority of the Council and adopted without change by the second chamber. The first chamber would not be entitled to block such legislative acts.
In some policy areas it may be necessary to simplify legislation, notably regulation, or repatriate powers (e. g. with regard to agricultural and structural policies). As neither the Commission nor the first chamber is interested in giving up powers, there has to be a democratic way of decentralizing policy without their consent.
- C) The size of the first chamber has to be reduced.

3. The Court of Justice

- A) The judges of the Court of Justice should serve one eight year term without re-appointment.

Currently the judges have six year terms but may be re-appointed indefinitely. Their mean term length has been more than nine years. The prospect of re-appointment can make them dependent on the government of their home country. As the judges need some time to get acquainted with their task, one eight-year term seems to be more appropriate than one six-year term.

- B) It is necessary to add a European Court of Review (or “Subsidiarity Court”) which may take up and decide all cases potentially involving the allocation of competencies between the Union and its member states.

The judges of the Court of Justice have a vested interest in transferring power from the member states to the EU level because, by doing so, they can increase their own influence. The larger the powers of the EU institutions, the more numerous, important and interesting are the cases which the EU judges may decide. Cases which had been intra-national (e. g., conflicts between different institutions of the same member state) and which had been settled by the national constitutional court become EU cases to be decided by the Court of Justice if the competency for the policy field in question is transferred to the EU level. In 69 per cent of its cases, the Court of Justice decides against the member states and in favour of the Commission, and there is not a single ultra vires case in which it has favoured the member states. It is often called “an engine of integration”. However, a court should not promote a political programme. It ought to be an impartial interpreter of the treaties. Thus, the task of adjudicating at the EU level and the task of adjudicating between the EU and the national level should be separated. Just as the European Parliament needs a second chamber another chamber ought to be added to the Court of Justice.

- C) The judges of the European Court of Review should be delegated by the highest courts of the member states for a maximum of six years.

As in the case of the European Parliament, the second judicial chamber ought to be linked to the corresponding national institutions. The exchange of judges between the national and the EU level would improve the integration of EU and national law.

- D) All judges appointed to an EU court should have acquired judicial experience in their home country.

At present such a requirement does not exist. Traditionally, about one half of the judges lack judicial experience. The current president of the Court and his predecessor are former professors of European law and have never served at a court before.

4. Bottom-up democracy

- A) A qualified majority of the national parliaments (one third) or of voters in the European Union (one quarter of one percent) may petition for a referendum on any law or act that concerns the allocation of powers between the Union and the member states. The result shall be binding when supported by a two thirds majority of those voting in a majority of member states.

Simultaneous surveys among national parliamentarians and national electorates

reveal that the national parliamentarians tend to be more in favour of EU centralization than the citizens themselves. A possible explanation is that they tend to share their government's interest in international policy cartels with regard to taxation and regulation. The ECG believes that, in a democracy, the citizens ought to be the ultimate sovereign.

- B) Any increase to the limit of the financial framework expressed as a percentage of the Union's Gross Domestic Product should require the support of a simple majority of those voting in each of the net contributing states.
EU revenue is determined by the member states acting unanimously but the national politicians are more willing to spend public money than the taxpayers. This is especially likely in member states which contribute more tax revenue to the EU budget than they receive back from EU spending.
- C) Amendments to the treaties should be drafted and adopted by an Interparliamentary Conference of the national parliaments, be submitted to a referendum in each member state and be ratified by each national parliament. The referendum is binding on the parliament of the member state if its constitutional practice includes legislative referenda.
At present amendments have to be adopted by an Intergovernmental Conference or by the European Council before being submitted to the national parliaments or the citizens directly in accordance with national constitutional requirements. This means that the parliaments face a take-it-or-leave-it decision and that they cannot amend the treaties against the will of the governments. In particular, they cannot take powers back from the governments. This is inconsistent with the principle of delegated powers.
- D) The ECG is opposed to the empowering clause that, under certain conditions, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, may adopt measures even if "the Treaties have not provided the necessary powers" (Art. 352 Sect. 1 TFEU). This clause disempowers the national parliaments and is inconsistent with the principle of delegated powers.
- E) A qualified minority of national parliaments should be able to block any new proposed measure and, with the assent of a simple majority of the Council, to revoke any existing directive or regulation.
- F) Each member state should be entitled to institute a "step-back" provision to limit immigration from whatever source.

5. Brexit

- A) The European Union should not raise and resurrect but lower trade barriers in Europe.
- B) The European Union and the United Kingdom should mutually recognize trading standards and financial standards based on internationally agreed principles.
- C) The maintenance of free trade and capital movements may be conditional on continued cooperation in providing common and international public goods such

as security, the environment, air traffic control, research, competition, development aid and fisheries.

- D) Both sides should agree to maintain visa-free travel.
- E) Disputes arising from these arrangements cannot in general be adjudicated by the Court of Justice because it is an interested party. Balanced dispute settlement mechanisms will need to be designed for different areas in addition to a tribunal for general matters.

6. Reform of the eurozone

- A) There is no need for a stabilisation function at the level of the eurozone. It would weaken the incentive to stay away from the three per cent deficit ceiling in normal times. The capital market union ought to be completed so as to facilitate the compensation of asymmetric shocks by international capital movements.
- B) Members of the eurozone that persistently violate Treaty provisions against excessive deficit financing should automatically cease to be members of the eurozone without losing their membership of the European Union.
- C) The ECG does not believe that more mandatory risk sharing among banks in the eurozone is necessary or desirable. It would encourage risk-taking and negligence as associated costs could be passed on to third parties.
- D) The proposed Structural Reform Support Programme would reward inaction in the past. The EU would compete for customers with the International Monetary Fund both lowering standards and reducing enforcement. With Europeans deciding about Europeans, the EU would be less strict than the IMF.
- E) Temporary subsidies under the proposed Convergence Facility would be inconsistent with the Treaty. According to the Treaty, accession to the eurozone requires that compliance with the convergence criteria is not temporary but sustainable.
- F) Members of the eurozone should have the right to leave the monetary union without leaving the European Union.

Conclusion

In the French liberal tradition, Charles Montesquieu, Benjamin Constant and Alexis de Tocqueville are famous for advocating political decentralization:

“En Asie, on a toujours vu de grands empires: en Europe, ils n’ont jamais pu subsister. ... En Europe, le partage naturel forme plusieurs états d’une étendue médiocre, dans lesquels le gouvernement des lois n’est pas incompatible avec le maintien de l’état: au contraire, il est si favorable, que, sans elles, cet état tombe dans la décadence et devient inférieur à tout les autres. C’est qui a formé un génie de liberté” (Montesquieu, *De l’esprit des lois*, 1748, Livre XVII, Ch. VI).

“It is by sacrificing everything to exaggerated ideas of uniformity that large states have become a scourge for humanity. ... For morality, justice, peace, a certain kind of happiness, and all natural affections, small states are preferable to large ones. ... Size requires an activism

and force at the heart of government which is difficult to contain and degenerates into despotism. The laws come from a point so far from those to whom they are supposed to apply that the inevitable effect of such distance is serious and frequent error. ... The inhabitants of the most distant provinces are suddenly surprised by unexpected innovations, unmerited severity, vexatious regulations, undermining the basis of all their calculations, and all the safeguards of their interest ...”(Constant, *Principes de politique*, 1806, Livre 15, Ch. 3; translated by Dennis O’Keeffe, Indianapolis 1985, pp. 323f.).

“Plus le peuple est grand, plus le prince est fort. ... Les petites nations ont donc été de tout temps le berceau de la liberté politique. ... La liberté forme, à vrai dire, la condition naturelle des petites sociétés. ... S’il n’y avait que de petites nations et point de grandes, l’humanité serait à coup plus libre et plus heureuse. ... Rien n’est si contraire au bien-etre et à la liberté des hommes que les grands empires ...” (de Tocqueville, *De la démocratie en Amérique*, 1835, Livre I, Ch. VIII).

What would Montesquieu, Constant and de Tocqueville say today about the centralization of Europe?